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Dortha Nielson Mortensen, Robert Stanley Mortensen v. Dwight Brown, Dwight's Auto Wrecking : Brief of Appellee

Utah Court of Appeals

Marvin D. Bagley; Douglas Neeley; Counsel for Appellees.
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IN THE UTAH COURT OF APPEALS

DORTHA NIELSON MORTENSEN and ROBERT STANLEY MORTENSEN, Plaintiffs/Appellees, vs. DWIGHT BROWN dba DWIGHT'S AUTO WRECKING, Defendant/Appellant.	)	BRIEF OF APPELLEES Case No. 20080713-CA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGES

STATUTES AND RULES

IN THE UTAH COURT OF APPEALS

DORTHA NIELSON MORTENSEN and ROBERT STANLEY MORTENSEN, Plaintiffs/Appellees, vs. DWIGHT BROWN dba DWIGHT'S AUTO WRECKING, Defendant/Appellant.	)	BRIEF OF APPELLEE Case No. 20080713-CA

STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal as a case transferred from the Utah Supreme Court pursuant to Section 78-2a-3(2)(j) Utah Code Ann.; and for which this court granted permission to appeal pursuant to Rule 5 Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES

Did the trial court correctly deny defendant Dwight Brown's dba Dwight's (hereinafter "Dwight's") Motion for Summary Judgment after determining that genuine issues of material fact existed as to whether Dwight's intentionally failed to report the decedent's employment and payroll for the purpose of avoiding paying worker's compensation insurance premiums and payroll taxes for the decedent's employment.

Is Dwight's, as the decedent's employer, entitled to protection from suit by the exclusive remedy provision of Utah's Workers Compensation law when he fraudulently

cheated the system by purchasing a Worker's Compensation policy based on reported employment and payroll of a few part time employees; while actually employing the decedent and numerous other employees under the table and intentionally failing to report their employment and payroll to avoid paying insurance premiums and employment taxes?

STANDARD OF REVIEW

An appellate court reviews a trial court's legal conclusions and denial of a motion for summary judgment for correctness. *Orvis v. Johnson*, 177 P.3d 600, ¶6 (Utah 2008). The appellate court views the facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *Id.* "A summary judgment movant must show both that there is no material issue of fact *and* that the movant is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c)." *Id.* at ¶10.

STATEMENT OF THE CASE

This is an action for wrongful death. Plaintiffs Dortha Mortensen and Stanley Mortensen (hereinafter "the Mortensens") are the parents of the decedent James Carl Mortensen (hereinafter "James"). James was killed on November 20, 2003 at Dwight's auto salvage yard. James was twenty years old at the time of his death. Dwight's was James' employer and is the owner of the salvage yard. James was crushed when an automobile he was working under came down, crushing his chest. The Complaint is based on allegations of negligence on the part of Dwight's.

Dwight's claims immunity from suit based on his status as employer and the provisions of the exclusive remedy provision of Utah's worker's compensation law. Dwight's asserts that because he purchased a worker's compensation insurance policy he is entitled to immunity. The Mortensens counter that the exclusive remedy provision only protects employers who properly and in good faith obtain insurance coverage and pay premiums for all of their employees. They claim the exclusive remedy provision does not protect employers who intentionally employ employees "under the table" and fraudulently fail to report employment and payroll for some of their employees to avoid paying premiums and taxes. Such fraud nullifies the exclusive remedy protection and subjects employers to civil suit for injuries and wrongful death of their employees.

Dwight's never reported James' employment or payroll at any time prior to his death; despite the fact James had been employed by Dwight's full time for approximately eighteen months prior to his death.

The evidence submitted in connection with the motion for summary judgment established that Dwight's did obtain a policy of worker's compensation insurance from Worker's Compensation Fund of Utah. However, in purchasing the policy Dwight's fraudulently understated the estimated amount of payroll. Dwight's stated an estimated amount of total annual payroll for all of his employees of $12,293; or an amount for approximately only three part-time employees. Dwight's did not thereafter report the decedent's and several other employees' employment and payroll. In the audit after the

end of the policy period, Dwight's reported actual payroll for only three part-time employees despite the fact he had at least six other employees. At no time prior to James' death did Dwight's report James' employment or payroll. In fact Dwight's fraudulently reported actual total payroll for the year of only $8,248 which was substantially less than the stated estimate. As a result of his fraud, Dwight's even received a partial refund of premiums paid.

Even after James died and James' family had inquired into the question of worker's compensation benefits Dwight's chose not to be honest in his post policy period audit report and chose not to amend his prior filed employer's quarterly federal tax returns. Instead Dwight's asserted that James had only begun working for Dwight's at the very end of September 2003 and that James was Dwight's sole employee during the last quarter of 2003. The true facts were that James had been working for approximately eighteen months prior to his death and approximately six other employees were also employed by Dwight's.

By fraudulently understating the amount of estimated payroll in connection with the purchase of the policy and then by failing to report the actual employment and payroll of the majority of his employees to Workers Compensation Fund and in his state and federal employer tax returns Dwight's fraudulently avoided paying workers compensation insurance premiums and taxes for James and the other non-reported employees.

Dwight's filed a Motion for Summary Judgment and (following additional

discovery) a Renewed Motion for Summary Judgment. The motions were based on alleged immunity from suit under the exclusive remedy provision of the Worker's Compensation Act. The trial court properly denied both motions concluding that an employer who intentionally cheats on its obligation to report payroll is not "properly insured" and thus is not entitled to the benefits of the exclusive remedy provision of the Worker's Compensation law. The trial court found that numerous questions of material fact existed regarding whether Dwight's intentionally failed to report James' employment and payroll.

Dwight's filed a petition for permission to appeal with the Utah Supreme Court. The case was transferred to the Utah Court of Appeals which granted this interlocutory appeal.

STATEMENT OF FACTS

1. Plaintiffs the Mortensens are the parents of the decedent, James. (R. 1, 7-8)

2. Defendant Dwight's is the owner of Dwight's Auto Wrecking, an automobile wrecking and salvage business located in Sevier County, State of Utah. (R.1, 7)

3. Dwight's hired James to work in the salvage yard commencing in the late spring or summer of 2002. (R. 544, 556)

4. From the commencement of his employment until his death on November 20, 2003 (approximately eighteen months) James worked as a full time employee of Dwight's. (R. 544, 556)

5. James was killed on November 20, 2003, while working for Dwight's at Dwight's automobile salvage yard. James died when an automobile he was working under came down crushing his chest. (R. 2, 7)

6. Dwight's initially paid James $5.00 per hour. James was later given a raise to $6.00 per hour. (R. 545)

7. James' work schedule was from 8:00 a.m. until 6:00 p.m. Monday through Friday with time off for lunch and from 9:00 a.m. until 1:00 p.m. on Saturdays. (R. 544).

8. At the end of each work day James and his co-employees went into Dwight's office where Dwight Brown paid them in cash their wages for that day. (R. 544)

9. James never received a paycheck and was never provided any record of time worked or income received. (R. 544)

10. Dwight's did not provide James with a W-2, a 1099, or any other tax form for the year 2002. Likewise Dwight's did not provide James with a W-2, a 1099, or any other tax form showing income paid for the first three quarters of 2003.

11. In July 2003 Dwight's also hired James' younger brother, Robbie Mortensen, to work the same schedule and perform the same type of labor as James. Dwight Brown told Robbie at the time he hired him he would be paid "under the table." Dwight Brown told Robbie the other employees were paid the same way. (R. 544)

12. Robbie was not asked to fill out a W-4 form or any other tax or employment form. Dwight's never withheld any taxes from his wages. (R. 544-45)

13. During the time that Robbie and James worked for Dwight's there were at least five other employees who worked with them performing the same tasks including Todd Nebeker, Cameron Jacobsen, Jordan Brown, Trevor Page and another person called "Moose." (R. 546)

14. Robbie observed that all of the employees were paid cash at the end of each day the same way that he and James were paid. (R. 546)

15. During the time that James and Robbie were employed by Dwight's, Dwight Brown admitted on several occasions they were not covered by worker's compensation insurance. Robbie suffered minor injuries on the job three different times. When he reported the injuries, Dwight Brown instructed him that if he went to the hospital to not report the injury as work related. Dwight told Robbie, "If you report it on my worker's compensation I will get in trouble." (R. 545-46)

16. On one occasion when James hurt his back, Dwight instructed James not to go to the doctor. Dwight Brown stated, "I don't have you on worker's comp." (R. 545-46)

17. During the period of James' employment Dwight's obtained a worker's compensation insurance policy from Worker's Compensation Fund of Utah. The policy was issued January 15, 2003, and the policy period was March 2, 2003 to March 2, 2004. To calculate the premium to be billed for the year Dwight's was required to state to Worker's Compensation Fund an estimated total annual payroll amount. Dwight's intentionally understated his projected payroll. Dwight's stated an estimated annual

payroll for all employees of only $12,293. That amount was substantially understated in view of the fact James was working full time and Dwight's also had several other full and part time employees. By fraudulently understating his estimated payroll Dwight's received the benefit of a lower premium. (R. 85, 546)

18. Workers Compensation Fund then requires employers to report the actual payroll paid to all employees during the policy period. Employers are required to report actual payroll paid in a final audit report. In some cases reports are required to be made quarterly. The reporting is substantiated by the submission to Workers Compensation Fund of copies of the Employer's Federal Quarterly Tax Returns and/or State Unemployment returns. Dwight's made his final report online and did not submit tax returns. Dwight's reported actual payroll of $8,248. (R. 563) (Citing the Deposition of Linda Haag, employee of Workers Compensation Fund pp.14-22)

19. The terms of the insurance policy also required Dwight's to report *all* payroll for *all* employees. PART FIVE C of the policy states how the premium is calculated and states in pertinent part: "This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of: (1) all your officers and employees engaged in the work covered by this policy." (R. 562) (A copy of the policy is attached as Appendix 6 to Appellant's Brief.)

20. Similarly the policy required that Dwight's final premium be calculated based on the actual remuneration paid to his employees. PART FIVE E of the policy states in

pertinent part: "The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy." (R. 562-63) (A copy of the policy is attached as Appendix 6 to Appellant's Brief.)

21. Workers Compensation Fund also issued an Employer's Handbook to Dwight's in connection with issuance of the insurance policy. The Handbook also placed an obligation on Dwight's to report all payroll of all his employees. The insurance policy in PART FIVE A provides that the premium for the purchase of the policy is to be determined by WCF's manuals of rules, rates, rating plans and classifications which includes the Employer's Handbook. The Handbook on page 24 provides a definition of employee. Under the definition the Handbook states, "Payroll for all persons meeting this definition of an employee should be reported." (R. 562, 622)

22. Not only did Dwight's misrepresent the estimated payroll amount in order to purchase the policy at a reduced rate he also fraudulently misrepresented the actual amount of payroll in his audit report at the end of the policy term. Worker's Compensation Fund's "Term Closing Payroll Entry" which reflects actual payroll shows that Dwight's reported only $8,248 in actual payroll. (R. 553-54; 571-72)

23. Dwight's also fraudulently misrepresented his total payroll for all employees for 2003 in the four 2003 Employer's Quarterly Federal Tax returns and the 2003 State Unemployment Tax return that he filed. Dwight's total reported payroll for 2003 for tax

purposes was the same $8,248 amount reported to Workers Compensation Fund. (R. 553-54, 571-84).

24. Vicky Brown who is Dwight Brown's wife and Dwight's bookkeeper testified in deposition that Dwight's records show Dwight's employed only three persons in 2003. (R. 554) Dwight Brown also testified he had only three employees in 2003. Dwight Brown testified James did not start work until the end of September 2003. Dwight Brown also falsely testified that Robbie Mortensen and the five other employees identified by Robbie Mortensen were never employed by Dwight's.

25. The only payroll records that Dwight's produced in discovery were some handwritten ledgers. Those ledgers identified only three part time employees during 2003.[1] The payroll for those employees was the only payroll Dwight's reported for 2003. (R. 553-54, 571-73 and 602-06)

26. Dwight Brown and Vicky Brown's deposition testimony and Dwight's internal ledgers directly conflict with the affidavit testimony of Robbie Mortensen who testified there were five other employees that worked for Dwight's during 2003 in addition to the three named in Dwight's payroll ledgers. (R. 546)

27. Dwight's first Motion for Summary Judgment as well as his Renewed Motion for Summary Judgment are based in part on the factual assertions that James had been

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[1]One of those employees was only employed during 2003 prior to the time Robbie Mortensen was employed. There were at least eight total employees during 2003.

employed by Dwight's since only the end of September 2003, less than two months before his death.[2] That position is directly controverted by the affidavit testimony of James' brother and co-worker Robbie Mortensen as well as the deposition testimony of James' mother and father which establish that James had worked continuously full time for Dwight's for approximately eighteen months prior to his death. (R. 71, 543-44 and 551-52)

28. During discovery the Mortensens obtained James' medical records from Sevier Valley Hospital. A billing record from the hospital shows James was admitted for services on November 8, 2002, more than a year prior to his death. Under the heading"Employer's Name" the billing statement lists "Dwight's". This evidence further contradicts Dwight's factual statement in support of his motion for summary judgment that James was not employed until the end of September 2003. (R. 570)

29. In the absence of a civil action for wrongful death in this case the only compensation available to the Mortensens for the loss of their son is payment of the ambulance and emergency room charges and a small amount for funeral expenses. (R. 56-67) (Citing the Deposition of Deborah Myer, employee of Workers Compensation Fund at pp. 6-7)

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[2]The end of September 2003 date is significant. Dwight's had not reported James' payroll in the approximate six quarterly federal tax returns filed prior to James' death. Following James' death Dwight's status as James' employer became common knowledge. By fraudulently stating that James only began work at the end of September Dwight's could report only the income paid to him during the last quarter of 2003 (October and November); and thereby continue his ruse.

SUMMARY OF THE ARGUMENT

The exclusive remedy provision of Utah's worker's compensation law provides employers with immunity from suit only if employers secure the payment of worker's compensation benefits by "properly" insuring and keeping insured payments of such compensation. An employer who fraudulently avoids paying premiums for such benefits by intentionally failing to report all employment and payroll for all employees is not "insured" for purposes of the exclusive remedy provision. Employers are not immune from suit for injuries and death to employees whose payroll has not been reported and premiums for that payroll have not been paid.

Dwight's did not report the employment or payroll for James, and did not pay premiums for the payroll paid to James at any time prior to James' death. Dwight's is thus not protected from suit by the exclusive remedy provision of Utah's worker's compensation law.

Numerous questions of fact exist as to Dwight's fraudulent intent. The trial court correctly denied Dwight's Renewed Motion for Summary Judgment. The trial court's decision should be affirmed.

ARGUMENT

I. The Trial Court Correctly Denied Dwight's Motion For Summary Judgment.

Section 34A-2-201 Utah Code Ann. requires all employers in the State of Utah to secure and provide worker's compensation benefits for their employees. Section 34A-2-201 Utah Code Ann. provides three options for employers to provide such benefits and

states in pertinent part:

> An employer shall secure the payment of workers' compensation benefits for its employees by:
>
> (1) insuring, and keeping insured, payment of this compensation with the Worker's Compensation Fund;
>
> (2) insuring, and keeping insured, the payment of this compensation with any stock, corporation or mutual association authorized to transact the business of workers' compensation insurance in this state; or
>
> (3) obtaining approval from the division in accordance with Section 34A-2-201.5 to pay direct compensation as a self-insured employer. . .

If employers comply with the requirements of Section 34A-2-201 Utah Code Ann. their employees and their beneficiaries are entitled to recover the statutory benefits allowed under the Utah Workers Compensation Act for their injuries and death that occur during the course of their employment; regardless of fault. In exchange employers are granted immunity from suit for their employees' job related injuries and death. The exchange is a *quid pro quo*. However, if an employer fails to provide such benefits there is no *quid pro quo* and the exclusive remedy provision of the Act does not apply. In those cases employers are subject to suit by their employees or their heirs for injuries and death. Section 34A-2-207 Utah Code Ann. states:

> Employers who fail to comply with Section 32A-2-201 are not entitled to the benefits of this chapter or Chapter 3, Utah Occupational Disease Act, during the period of noncompliance, but shall be liable in a civil action to their employees for damages suffered by reason of personal injuries arising out of or in the course of employment caused by the wrongful act, neglect, or default of the employer or any of the employer's officers, agents, or employees, and also to the dependants or personal representatives of such employees when death results from such injuries.

In *Sheppick v. Albertson's, Inc.*, 922 P.2d 769 (Utah 1996) the Utah Supreme

Court explained this doctrine. The Court stated:

> [I]f an employer fails to comply with the insurance requirements stated in Utah Code Ann. Section 31-1-46, [the predecessor statute to Section 34A-2-201] which requires employers to either provide workers' compensation insurance or to be self-insured if the Commission finds that certain requirements are met, an employee may sue in district court for personal injuries "arising out of or in the course of employment caused by the wrongful act, neglect or default of the employer or any of the employers' officers, agents or employees".

See also *Anabasis, Inc. v. Labor Commission*, 30 P.3d 1236, 1241 n.5 (Utah App. 2001).

In this case Dwight's did not comply with the requirements of Section 34A-2-201 with regard to the decedent, James. Rather Dwight's hired and paid James "under the table". Dwight's fraudulently failed to disclose James' payroll and the payroll of several other employees in the payroll estimate Dwight's stated to obtain the policy from Workers Compensation Fund for the period in which James died. Dwight's failed to state James' payroll even though at that time James was employed full time; and had been for several months. Indeed Dwight's never reported James' payroll to Workers Compensation Fund at any time prior to James' death. Neither did Dwight's withhold state or federal income tax from James' compensation and never withheld FICA compensation.

Likewise Dwight's did not include James' income in approximately five Employer's Federal Quarterly Tax Returns or in the State Unemployment Returns that were filed for the time that James was employed by Dwight's. Indeed at no time prior to James' death did Dwight's report James' employment or payroll to Workers Compensation Fund or to the federal government or to the State of Utah; even though

Dwight's was required to do so by the terms of the insurance policy, the Workers Compensation Fund standard policies and procedures and by federal and state law.

Only after James' death when Dwight's employment relationship became an issue of potential liability did Dwight's acknowledge James as an employee. Even then Dwight's chose to continue his ruse and reported James' payroll for only the few weeks prior to his death. Dwight's also chose not to amend his prior filed tax returns to correct his omission of James' income for the prior eighteen months. Indeed Dwight's chose to continue his fraudulent scheme by taking the position that James had only been employed commencing the end of September 2003. By coming up with the end of September 2003 as James' hire date Dwight's schemed to cover his prior reporting failures by falsely showing the only compensation paid to James was during the last quarter of 2003, i.e. October and November. Under the scheme James' payroll would then only need to be included in the last quarter's 2003 Federal Quarterly Return.

Likewise by choosing not to amend his tax filings Dwight's schemed he could avoid producing the tax returns in any end of term audit required by Workers Compensation Fund. The problem with Dwight's ruse is that he failed to comply with Section 34A-2-201 Utah Code Ann relating to James at any time prior to James' death. Thus under the terms of Section 34A-2-207 Utah Code Ann. the Mortensens are entitled to maintain a civil suit against Dwight's for James' wrongful death.

In denying the Motion for Summary Judgment the trial court relied upon *Thomas*

A. Paulsen Co. v. Industrial Commission, 770 P.2d 125, 127 (Utah 1989) and *Anabasis, Inc. v. Labor Commision,* 30 P.3d 1236 (Utah App. 2001) for the proposition that to be insured under Section 34A-2-201 Utah Code Ann. an employer must be "properly insured". To be "properly insured" the trial court stated:

> There are two requirements. First, "an employer must insure its employees with workers' compensation insurance." *Id.* at 1240. Second, "an employer must keep all its employees insured for workers compensation". *Id.* (R. 665) (Emphasis added)

The trial court properly focused on the word "all" employees which is not only used in the case law but is also used in the policy and in the Workers Compensation Handbook. Those authorities require employers to insure all of their employees to be properly insured. Indeed any other analysis defies logic. An employer cannot be deemed to have provided insurance for an employee the employer intentionally chose not to insure. By not reporting James' employment and payroll and by failing to pay insurance premiums on his behalf Dwight's effectively chose not to provide benefits for James.

Dwight's argued in support of his Motion for Summary Judgment that his under-reporting made no difference because under the terms of the policy Dwight's had the ability to report the actual correct payroll at the end of the policy period. The trial court was not persuaded because Dwight's did not report James' actual payroll at the end of the policy period when he had the opportunity to do so. The trial court thus concluded Dwight's under-reporting and failure to report were intentional. At a minimum the court found genuine issues of material fact existed regarding the issue of intent.

In its first Memorandum Decision denying Dwight's initial Motion for Summary Judgment the trial court also properly analyzed that when an employer chooses not to properly report payroll and in essence does not obtain insurance and pay premiums for an employee there is no *quid pro quo* for the immunity from suit. The trial court relied upon *Shattuck-Owen v. Snowbird Corp.*, 16 P.3d 555, 560 (Utah 2000) and *Hunsaker v. State*, 870 P.2d 893, 899 (Utah 1993) for its analysis. The trial court's analysis was correct. There can be no *quid pro quo* when what is being given in exchange for what is received is not in fact given with respect to an individual employee. The facts are clear James' employment and payroll were never reported prior to his death and no premiums were paid on his behalf. James died during the period of noncompliance.

II. The Trial Court Correctly Found That Genuine Issues Of Material Fact Exist Which Precluded Summary Judgment

The trial court's denial of Dwight's Renewed Motion for Summary Judgment was based in part on a determination that genuine issues of material fact existed as to whether Dwight's intentionally under reported payroll. The trial court was correct.

Dwight's Motion was based in part on a statement of fact that James was hired by Dwight's at the end of September 2003. The Mortensens however submitted the Affidavit of Robbie Motensen together with deposition testimony of both Dortha Mortensen and Stanley Mortensen establishing that James was hired in the early spring or summer 2002. The medical billing record from Sevier Valley Hospital also established that James informed the hospital in November 2002 that he was employed by Dwight's.

There is clearly as issue of fact as to James' hire date. The issue is relevant because if the finder of fact determines that James was indeed hired approximately eighteen months before his death, Dwight's failure to report James' income for that length of time is highly relevant to Dwight's fraudulent intent.

There are also issues of fact as to how many employees Dwight's employed during 2003 and their employment dates. Dwight's reported actual total payroll for 2003 for all employees of $8,248. Dwight Brown and Vicky Brown testified as to having only three part time employees in all of 2003. Dwight's internal ledgers also show only three part time employees. Dwight's even testified in deposition that Robbie Mortensen and several of the other named employees never worked for Dwight's. In contrast Robbie Mortensen testified by affidavit that while he worked for Dwight's in 2003 at least seven employees were employed. These issues are material because if the finder of fact determines Robbie Mortenson and the other named employees were employed by Dwight's in 2003 such a finding is a determination that no payroll was ever reported for James' employment prior to his death. Such a finding is also highly relevant to Dwight's fraudulent intent.

There are also issues of fact as to whether Dwight Brown admitted to James that James was not covered under worker's compensation insurance. There are also issues of fact as to whether Dwight Brown made the same admissions to Robbie Mortensen. Again these issues are material and relevant to Dwight's fraudulent intent and scheme. There are also issues regarding other terms of James' and other employees' employment that are

also relevant to the issue of whether Dwight's intentionally failed to report James' and the other employees' payroll. A determination by the jury of intentional wrongdoing logically would lead the jury to determine that insurance coverage for James was not obtained or paid for.

All of these issues of fact must be resolved before the jury can answer the bigger factual question of whether Dwight's secured the payment of worker's compensation benefits for its employees by "insuring and keeping insured" the payment of such compensation as is required by Section 34A-2-201(1) Utah Code Ann. The Mortensens, as the parties opposing the summary judgment motion are entitled to an interpretation of the facts and all reasonable inferences drawn therefrom resolved in their favor. Under that standard the trial court correctly denied the motion for summary judgment.

III. Dwight's Is Not Entitled To Immunity From Suit Under The Exclusive Remedy Provision Of The Workers Compensation Act

The evidence submitted by the Mortensens in opposition to Dwight's Renewed Motion for Summary Judgment established that Dwight's *intentionally* failed to report James' and several other employees' employment and payroll. As such at the time of James' death Dwight's was not in compliance with the terms of the WCF policy, the terms of the WCF Employer's Handbook, and most importantly, Section 34A-2-201 Utah Code Ann.

This case is similar to *Shifflett v. McLaughlin*, 407 S.E.2d 399 (W.Va. 1991) in which the employer paid its part time employees in cash and did not report their

employment on any tax returns or workers' compensation payroll reports. One of the part time employees was killed in an automobile accident while being driven by a co-employee. The personal representative of the decedent filed a wrongful death action in court. The employer defended claiming the benefits of immunity under Workers' Compensation law. The Supreme Court of Appeals of West Virginia ruled in favor of the plaintiffs holding that when an employer fails to report payroll the employer becomes delinquent for purposes of workers' compensation law and is not entitled to the protection of the exclusive remedy. The employer also asserted that because the decedent died before the end of the month following the quarter in which premium payment was required to be made the employer was not actually delinquent. The court addressed that argument as follows:

> As stated in the Kosegi v. Pugliese, [407 S.E.2d 388 (1991)] payments are due before the end of the month following the quarter. During hearings, appellees' counsel also contended that because the death of Mark Shifflett occurred before the end of the month following the quarter in which the Better Business Systems was required to remit a payment, the appellee was not delinquent. By that reasoning, an employer could always correct a delinquency in the case of death, by paying within the required period, even though not reporting the wages. The flaw in this argument is obvious. 407 S.E.2d at 402 n. 8.

Similarly in *Buerkley v. Aspen Meadows Limited Partnership*, the Supreme Court of Montana ruled that an employer was not entitled to the protection of the exclusive remedy provided by worker's compensation laws when the employer paid the employee "under the table", had not made payroll deductions from his paycheck, paid the employee

in cash and had not reported the employee's payroll to the worker's compensation provider. The court ruled:

> [T]he requisite *quid pro quo* is absent when an employer has deliberately avoided the cost of insuring an employee by failing to acknowledge his existence in its payroll records. In such cases, an employer should not be able to take refuge behind the exclusive remedy provision. *Id.* 980 P.2d at 1049.

Similarly in the Wyoming case of *Robinson v. Bell*, 767 P.2d 177 (Wyo. 1989) the employer sought protection of the exclusive remedy provision of Wyoming's worker's compensation statute by making retroactive payments to secure insurance after the employee had been injured. Because the employer had not shown the employee on its first payroll report that was filed following the hiring of the employee, the court found the employer had not qualified for protection under the Wyoming statute. The Court stated:

> [N]owhere in this statute, nor elsewhere in the Act, is it remotely suggested that an employer can obtain immunity from suit by applying for a worker's compensation account after his employee has been injured. . . . The clear import of the statute is that, when an employer was not qualified under the Act at the time of injury to an employee, the employer had no immunity. *Id.* at 180.

Similarly in *Muffett v. Royster*, 195 Cal. Rptr. 73 (Cal. App. 2 Dist. 1983) the California Court of Appeals held that where an employer had required the employee to pay a portion of the premiums for worker's compensation insurance, the employer's blatant failure to comply with the terms of the act prevented the employer from claiming the benefits of the exclusive remedy provision. The court stated:

> To allow the employer to raise the workers' compensation act as a bar to the civil suit where the employer so blatantly fails to comply with so fundamental a part of the act, would be inconsistent with the purposes of the act. 195 Cal. Rptr. at 80.

Likewise in this case, the requirement that Dwight's report "**all**" payroll of "**all**" employees from the time that Dwight's first hires each employee is a fundamental part of the *quid pro quo* granted in exchange for protection under the exclusive remedy. As the trial court noted in its Memorandum Decision on Dwight's first motion for summary judgment, the words "insuring and keeping insured" found in Section 34A-2-201(1) require that the employer be "properly insured". Memorandum Decision, page 3 citing *Thomas A. Paulsen Co. v. Industrial Commission*, 770 P.2d 125 (Utah 1989). (R. 230-235) Being "properly insured" requires reporting "all" payroll for "all" employees. The law should not allow Dwight's to blatantly abuse the worker's compensation system to pay employees under the table for purposes of avoiding taxes and payment of worker's compensation premiums. The trial court's denial of Dwight's Renewed Motion for Summary Judgment should be affirmed.

IV. Allowing Dwight's To Hide Behind The Exclusive Remedy Provision Would Effectively Deny The Mortensens A Remedy For The Loss Of Their Son.

If the Mortensens are denied the ability to pursue the claims raised in this action they will effectively be denied a remedy for the loss to them of the life of their son. During discovery the Mortensens took the deposition of Deborah Myer, a claim manager for WCF. Ms. Myer testified in her deposition that in the absence of a civil suit the only

worker's compensation benefits that could be awarded on behalf of James are the payment of medical expenses for James' ambulance ride and emergency room visit; together with a small amount for funeral expenses. She testified no other compensation is available or could be paid absent recovery in a civil action for wrongful death. (R. 566-67) (Citing Deposition of Deborah Myer, pages 6 and 7.

It would be against all equity and good conscience to allow Dwight's to fraudulently avoid payment of taxes and insurance premiums by paying employees under the table and not reporting their payroll; and then allow Dwight's to claim the benefits of the exclusive remedy provision. The law does not reward such fraudulent conduct and should not in this case.

CONCLUSION

The trial court's decision denying Dwight's Renewed Motion for Summary Judgment should be affirmed.

DATED this 6th day of January, 2009.

MARVIN D BAGLEY
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MAILING CERTIFICATE

On the 7th day of JANUARY, 2009, I caused to be mailed by U.S. Mail a ~~copy~~ two copies of the foregoing BRIEF OF APPELLEES to the following:

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